IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 758 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAGU PRABHAT VASAVA & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :

MR SUNIL MEHTA FOR MR SK BUKHARI for
Appellant(s) : 1 - 2.
MR KT DAVE, ADDL.PUBLIC PROSECUTOR for Respondent – State of Gujarat.
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 23/11/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 7.8.2001 rendered in Sessions Case No. 45 of 1991 by the learned Additional Sessions Judge, Bharuch. By the impugned judgment and order, the appellants ('A-1' and 'A-13' for short) were convicted of the offences punishable under Sections 307, 332, 333 and 353 of the Indian Penal Code ('IPC' for short) and under

Section 135 of the Bombay Police Act ('BP Act' for short) and sentenced them to suffer RI for ten years and fine of Rs.1500/- i.d., further imprisonment for six months for the offence under Section 307 of IPC, RI for two years and fine of Rs.150/- for the offence under Section 332 of IPC, RI for ten years and fine of Rs.1500/- i.d. further imprisonment for six months for the offence under Section 333 of IPC, RI for one year and fine of Rs.100/- i.d., further imprisonment for 15 days for the offence under Section 353 of IPC and imprisonment for six months for the offence under Section 135 of the BP Act. It is also ordered that all the substantive sentences shall run concurrently.

2. The prosecution case, as disclosed from the FIR and unfolded during trial, is as under:

2.1. On 11.3.1990, P.W.17, Arjunsinh Jyotisinh Baria, the complainant, was on bandobast being Holi-Dhuleti festival. He and Constable Shivabhai Gumanbhai and Mustak Ahmed were in the Mobile

Jeep of Amod police station at about 12.30 PM. Police Constable Chandrasinh Mohansinh was the driver of the mobile jeep and they were returning from patrolling. Bandobast was arranged at village Hirakui because of Holi-Dhuleti festival. Police constable Chandubhai and a home-guard Vinod Shantilal were coming from the village Hirakui. They waved hands and gave signal to stop the mobile jeep and accordingly the complainant's jeep was stopped and they were informed that persons were quarrelling at village Hirakui and if they say anything, the villagers will quarrel with them also. They requested the complainant and police party to go to the village. The complainant and other police personnel went to village Hirakui. At that time Jagu Prabhat, A-1, was quarrelling with his village people. P.W.17, the complainant, Arjunsinh, Shivabhai and other police personnel stopped the quarrel and caught hold of A-1. At that time Dhanji, Shamji, Budha, Manu, Ratilal and Mulji rushed with sticks and started shouting as to why did they arrest Jagu and they scuffled with police personnel. At that

time, Jagu Prabhat escaped from the hands of police personnel and ran away and thereafter came back with an axe in his hands and gave a severe blow on the police constable Shivabhai. As Shivabhai turned, the blow fell on the back side of the neck, causing serious injury and because of that he was bleeding. Ratilal and Shamji and others also gave stick blows to the complainant Arjunsinh Jyotisinh Baria, Budha Devji and Manu Devji gave stick blows on the back of the police constable Abdul Aziz. Mulvi Nagin and Dhanji Chiman were also armed with sticks. They also gave stick blows on the back of Mustak. Bachu and Dharma also scuffled with sticks on the driver of the jeep. There were about 10 to 15 persons.

2.2. As per further case of the prosecution, A-1 and A-13 and other accused formed an unlawful assembly with a common intention to assault the members of the police party and that is how they have committed the offence of an attempt to commit murder of police constable Shivabhai and caused injuries to other members of the police

party.

2.3. A complaint in respect of the aforesaid incident was filed against A-1 and A-13 and other accused persons for commission of the offences punishable under Sections 307, 332, 333 and 353 of IPC and under Section 135 of the BP Act by P.W.17, Arjunbhai before P.W.14, Udesing Galabhai Parmar, In-charge Police Circle Inspector of Jambusar Taluka which was reduced into writing as narrated by P.W.17, complainant Arjunsinh. The said complaint is on record at Ex.66.

2.4. Pursuant to the lodging of the complaint, offence was registered against the accused for commission of the offences as alleged in the complaint and investigation was handed over to P.W.18, Bhanubhai Laghabhai Vavaiya, PI, who recorded the statements of the injured witnesses who were members of the police party, sent them for medical check up, drawn up panchnama of the scene of the offence, arrest panchnama and

discovery panchnama of the weapons used by the accused for commission of the offences at the instance of the accused. On receipt of the injury certificates and as sufficient incriminating evidence was found against the accused, he filed charge-sheet against the accused before the concerned learned JMFC. As the offence punishable under Section 307 of IPC is exclusively triable by the court of Sessions, the learned JMFC committed the case to the Court of Sessions of Bharuch.

2.5. The learned Additional Sessions Judge, Bharuch, to whom the case was made over for trial, framed charge against A-1 and A-13 as well as other accused for commission of the offences punishable under Sections 307, 332, 333 and 353 of the IPC and under Section 135 of the BP Act. The accused pleaded not guilty to the charge and claimed to be tried and, therefore, they were put to trial and tried by the learned Additional Sessions Judge, Bharuch in Sessions Case No. 45 of 1991.

2.6.To prove the culpability of the accused, the prosecution has examined as many as 18 witnesses and relied upon their oral testimonies, the details of which have been given in paragraph 5 of the impugned judgment and order. They are as under:

PW No	Name and status	Ex.No
1	Natvarbhai Jesingbhai - Panch witness	41
2	Shanubhai Dhulabhai – Panch witness	42
3	Shantilal Govindbhai – Panch witness	43
4	Maheshbhai Dahyabhai Prajapati – Panch witness	44
5	Abdul Aziz Ismail	45
6	Jagjibhai Vishabhai Rabari – Panch witness	46
7	Ismailhaji Ali – Panch witness	47
8	Sikkandar Mahmad Patel – Panch witness	48
9	Dr. Jhaverbhai Mohanbhai Patel	51
10	Shivabhai Gumanbhai	55
11	Gordhanbhai Maijibhai	56
12	Ratilal Chunilal – Head Constable	57
13	Dr. Narndrakumar Gunvantrai Joshi	60
14	Udesing Galabhai Parmar	65
15	Mustakbhai Ali Ahmed	68
16	Nasrubhai Bajibhai Chauhan – Panch	69
17	Arjunsinh Jyotisinh Baria – complainant	77
18	Bhanubhai Laghabhai Vavaiya – Investigating Officer	81

2.7. The prosecution has also produced a

number of documents and relied upon the contents of the same. They are mentioned in para 4 of the impugned judgment and order.

2.8. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required under Section 313 of the Code. In their further statement they denied the prosecution case in toto and alleged that they were falsely implicated. However, they neither produced any evidence nor examined any witness in support of their defence.

2.9. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the learned trial Judge acquitted accused Nos.2, 4, 5, 6, 7, 8, 10, 11, 12, 14 and 15 of the offences punishable under sections 143, 147, 148, 149 and 427 of IPC by giving benefit of doubt and they

are also acquitted of the offences punishable under sections 307, 333, 332 and 353 of and also under section 135 of BP Act as there was no evidence against them. However, he convicted A-1 and A-13 for commission of the offences punishable under sections 307, 333, 332 and 353 of and under Section 135 of the BP Act and sentenced them accordingly to which reference is made in earlier paragraph of this judgment which has given rise to this appeal at the instance of A-1 and A-13.

3. Mr. Sunil Mehta, learned advocate of the accused, has taken us through the oral as well as documentary evidence which are on record and assailed the judgment and order of conviction and sentence recorded by the learned trial Judge by contending that there are substantial contradictions in the oral evidence of the prosecution witnesses. The learned trial Judge has not properly appreciated the oral testimonies of the prosecution witnesses as well as the medical evidence and the medical certificates in

respect of injured Shivabhai. It is also highlighted by him that P.W.9, Dr. Jhaverbhai Mohanbhai Patel, Ex.51 has stated in his deposition that when injured Shivabhai was brought to the hospital no primary treatment was found to have been given to him. However, P.W.5, Abdul Aziz Ismail, Ex.45, has in his deposition stated that the injured Shivabhai was initially taken to Primary Health Centre, Amod and thereafter he was transferred to Bharuch Civil Hospital, which clearly creates doubt in the prosecution story. He also contended that the learned trial Judge has committed error in holding that A-1 and A-13 inflicted blows knowing well that such blows would cause death of injured person, without there being any evidence on record to come to that conclusion, and thereby committed grave error in holding that the A-1 and A-13 have committed offence punishable under section 307 of IPC and thereafter further committed an error in ordering maximum sentence of RI for ten years which is extremely harsh on the facts and in the circumstances of the case.

He has also contended that P.W.9, Dr. Jhaverbhai Mohanbhai Patel, Ex.51, has in his cross-examination clearly stated that there were four injuries and except injury No.3, all injuries were of simple nature, and in his deposition he has not stated anywhere that any of the injuries were sufficient in the ordinary course of nature to cause death of the injured person. In this view of the matter, according to Mr. Mehta, the only offence which could be said to have been established against A-1 is an offence punishable under section 324 of and not under section 307 of IPC and in such circumstances, A-1 and A-13 could not have been awarded sentence of imprisonment for more than three years. So far as A-13 is concerned, the allegation against her was that she gave a blow with sickle upon Shivabhai which was not on vital part of the body and there is no evidence on record that A-13 was attributed with knowledge that A-1 inflicted axe blow on injured Shivabhai with an intention to kill him. In this view of the matter, so far as A-13 is concerned, according to Mr. Mehta, it

cannot be said that she has committed offence under Section 307 of IPC and the offence which can be attributed to her is offence punishable under Section 324 of IPC.

3.1. On the aforesaid premises it is submitted by him that the judgment and order convicting and sentencing A-1 and A-13 for commission of the offences punishable under Sections 307 and 333 of IPC cannot be sustained and therefore the same deserves to be quashed and set aside by allowing this appeal and thereby acquitting the accused of the offences with which they were charged.

3.2. In the alternative, it is submitted by him that the offences proved against A-1 and A-13, at the most, would be the offences punishable under Sections 324 and 332 of IPC and not under Sections 307 and 333 of IPC. A-1 has already undergone imprisonment of more than 5 years whereas A-13 has undergone imprisonment for more than one year and ten months. He, therefore, submitted that the custodial sentence

undergone by them may be treated as substantive sentence for the offences punishable under Sections 324 and 332 of IPC and the appeal may be partly allowed qua sentence accordingly.

4. Per contra, Mr. KT Dave, learned APP for the respondent – State of Gujarat, has contended that no interference is called for in the impugned judgment and order as no case is made out by the accused to take a view contrary to the view taken in the matter by the learned trial Judge. A-1 and A-13 attacked the members of the police party who were on duty and when they tried to intervene while quarrel was going on between the accused and other villagers and therefore they have taken law in their hands and tried to restrain the public servants from discharging their official duty. The evidence of the prosecution witnesses is consistent to the effect that A-1 and A-13 attacked Shivabhai and other police personnel with deadly weapons and caused grievous injuries to them and thereby the accused have committed offence of an attempt to commit

murder of Shivabhai. In this view of the matter, according to Mr. Dave, no leniency can be shown towards the accused. Evidence of the doctors who have examined Shivabhai is consistent and they have deposed that Shivabhai received serious injuries. The way in which the accused assailed Shivabhai was nothing but an attempt to commit murder of Shivabhai. So far as sentence imposed on the accused is concerned, for commission of offence under Section 307 of IPC, punishment provided is imprisonment for life or imprisonment for a term which may extend ten years. The learned trial Judge has awarded sentence of RI for ten years which cannot be considered as harsh looking to the manner and the method in which the crime was committed by the accused. He, therefore, submitted that the impugned judgment and order does not call for interference of this Court and as the appeal lacks merit, deserves to be dismissed. He, therefore, urged to dismiss the appeal.

5. This court has considered the submissions

advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with criminal cases, this Court has examined the entire evidence on record for itself independently of the learned trial Judge and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial court has rightly recorded the order of conviction and sentence.

6. As per the prosecution case, on 11.3.1990, P.W.17, Arjunsinh Jyotisinh Baria, the complainant, Ex.77, was on bandobast being Holi-Dhuleti festival. He and Constable Shivabhai Gumanbhai and Mustak Ahmed were in the Amod

Mobile jeep at bout 12.30 hours. Police Constable Chandrasinh Mohansinh was the driver of the mobile jeep and they were returning from patrolling. Bandobast for Holi-Dhuleti at village Hirakui was arranged and a police constable Chandubhai and a home-guard Vinod Shantilal were coming from the village Hirakui. They waved hands and gave signal to stop the mobile jeep and accordingly the complainant's jeep was stopped and they were informed that at village Hirakui people are quarrelling and if they say anything, the villagers will quarrel with them also. They requested to the complainant to come to the village. The complainant and other police personnel went to village Hirakui. At that time A-1, Jagu Prabhat, was quarrelling with his villagers. P.W.17, the complainant, Arjunsinh and Shivabhai and other police personnel stopped the quarrel and caught hold of A-1. At that time Dhanji, Shamji, Budha, Manu, Ratilal and Mulji rushed towards them with sticks and started shouting as to why did they arrest Jagu and scuffled with them. At this time, Jagu got

escaped from the hands of police personnel and brought an axe with him and gave a severe blow on the Constable Shivabhai. As Shivabhai turned, the blow fell on the back side of his neck, causing serious injury and because of that he was bleeding. Ratilal and Shamji and others also gave stick blows to the complainant Arjunsinh Jyotisinh Baria, Budha Devji and Manu Devji gave stick blows on the back of the police constable Abdul Aziz. Mulvi Nagin and Dhanji Chiman who were armed with sticks, gave stick blows on the back of Mustak. Bachu and Dharma, armed with sticks, also scuffled with the driver of the jeep. There were about 10 to 15 persons in the mob. As per further case of the prosecution, A-1 and A-13 and other accused persons formed an unlawful assembly with a common intention to assault the members of the police party and that is how they have committed the offence of attempt to commit murder of police constable Shivabhai and also caused injuries to other members of the police party.

7. It is true that the prosecution case rested on the evidence of the police personnel as the prosecution has not examined any independent witness and the panchas have turned hostile. A perusal of the entire testimonial collections coupled with the complaint and medical certificates issued by the doctors who have examined the injured, the evidence of the prosecution witnesses, though they are members of the police party, cannot be thrown overboard as they are consistent in narrating the story of the prosecution case. Therefore, we find no reason to disbelieve the story of the prosecution about the happening of the incident.

8. Mr. Sunil Mehta, learned advocate of the accused, could not dislodge the finding recorded by the learned trial Judge about the happening of the incident narrated in the complaint Ex.66. Therefore, it has to be deduced that the incident in question took place wherein Shivabhai and other police personnel received injuries at the

hands of the accused persons.

9. Now the question which calls for determination of this Court is as to whether the prosecution has established the case against A-1 and A-13 for commission of offence punishable under Sections 307 and 333 of the IPC.

10. In this connection, adverting to the evidence of P.W.10, Shivabhai Gumanbhai, Ex.55, which is at page 104 of the paper book, he has testified that on 11.3.1990 because of Holi-Dhuleti festival, he took the mobile vehicle of Amod Police Station for bandobast and at the relevant time he was working as Head Constable at Amod police station. He started at about 12.00 noon. Head constable Arjunsinh, Constable Mustak, Constable Abdul Aziz and driver Chandusinh were with him. They went to Nava Vadia village. When they were returning from village Nava Vadia and reached between Nava Vadia and Hirakui village, police constable Chandu Deva and Home Guard who

were sent for bandobast came from the opposite direction and after stopping the vehicle Chandubhai Devabhai informed that at village Hirakui villagers were quarrelling. They, therefore, took the mobile jeep towards Hirakui village and Chandubhai and Home guard followed them on cycle. At village Hirakui they found about 15 to 20 persons fighting. They asked them not to fight and caught hold of Jagu Prabhat. He identified the accused Jagu Prabhat who was present in the Court. He further stated that the accused persons who were sitting in the court, were also among the members of the mob of 15 to 20 persons but he could not say their names but said that he could recognize them. The villagers started scuffle with the police personnel as they caught hold of Jagu Prabhat and taking advantage of this situation, Jagu Prabhat got released himself from the hands of the police personnel and ran away and came back with an axe in his hands and his wife, Bai Suraj, who was sitting in the court as accused, came there with a sickle. A-1, Jagu Prabhat, inflicted an injury

with the axe on the neck of Shivabhai and another injury was caused on the ear of Shivabhai and because of that his right ear was torn. Bai Suraj, wife of accused Jagu Prabhat, inflicted injury with sickle on left side back and on other parts of the body also Shivabhai sustained injuries. Accused Ramji Karshan caused injury below the left knee with stick and other persons also had sticks and axes with them. Some of the persons caused damage to the jeep by stick blows. Abdul Aziz and constable Mustak were also injured with stick blows. The shirt was torn from the places wherever he sustained injuries. There was blood on the underwear and shirt. Thereafter injured Shivabhai was taken in the mobile vehicle to Amod Primary Health Centre and there Dr. Joshi treated him and thereafter referred him to Bharuch Civil Hospital and there he was treated as indoor patient for 14 days. The investigating officer noted down his statement in the hospital. He also identified the muddamal articles 11 and 12 which are sickle and axe and muddamal sticks.

10.1. In the cross-examination also he has admitted that there was a mob of about 15 to 20 persons and he could not give the names of the members of the mob except the name of A-1 Jagu Prabhat and accused No.3 Shamji.

10.2. The sum and substance of the evidence of P.W.10, Shivabhai, Ex.55, is that he was assaulted by A-1 with axe and A-13 with sickle and caused injuries to him.

11. The prosecution has thereafter examined and relied upon the evidence of P.W.17, Arjunsinh Jyotisinh Baria, Ex.77 which is at page 128 of the paper book. He was also a member of the police party, who was on bandobast duty with the injured Shivabhai. He is the person who lodged the complaint which is at Ex.66. During his examination-in-chief he has deposed as per the narration in the complaint at Ex.66. His evidence is also in similar line as that of P.W.10, Shivabhai at Ex.55. He has also testified that A-

1 inflicted blow with axe on the person of Shivabhai and A-13 also inflicted sickle blow on Shivabhai. In cross-examination he has admitted that he cannot identify the accused nor could he identify the accused who were in the mob.

12. The prosecution has thereafter examined P.W.14, Udesinh Galabhai Parmar, Ex.65, at page 119 of the paper book, who recorded the complaint when he was In-charge Circle Inspector at Jambusar Police Station as narrated by P.W. 17, Arjunsinh Jyotisinh Baria.

13. The evidence of P.W.10, Shivabhai Gumanbhai, Ex.55, P.W.17, Arjunsinh Jyotisinh Baria, the complainant, Ex.77 and P.W.14, Udesing Galabhai Parmar, Ex.65, are consistent with regard to the happening of the incident and the injuries sustained by Shivabhai. There is very scanty evidence on record with regard to injuries received by other witnesses and as to who inflicted injuries on them. In view of the

aforesaid evidence, the prosecution has established that the injuries which were found on injured Shivabhai were inflicted by A-1 and A-13. The question that arises for consideration, therefore, is as to whether the injuries sustained by injured Shivabhai can attract the penal provision of Sections 307 and 333 of IPC?

14. In this connection, we have to examine and scrutinize the evidence of P.W.9, Dr. Jhaverbhai Mohanbhai Patel, Ex.51, at page 96 of the paper book and P.W.13, Dr.Narendrakumar Gunvantrai Joshi, Ex.60, at page 111 of the paper book. P.W.9, Dr. Jhaverbhai Mohanbhai Patel, in his oral testimony has testified that he was running clinic in the name of Shraddha Clinic at Bharuch. On 11.3.1990 injured Shivabhai Gumanbhai was brought to his clinic in an unconscious condition. He examined him and noticed the following injuries:

(i) CLW – curved – convexity upward over back of

neck near occipital region 3″x1/2″x1/2″ - muscle cutting.

(ii) CLW over right parietal region near and above right ear 1 1/2″x1/2″x1/4″

(iii) CLW over right ear – across the ear from right mastoid bone to front of ear above right tagus 1 1/2″x 1/4″x1/4″ - cutting the ear from pinna to the back bone.

(iv) CLW over left shoulder antero-post about 1″x1/4″x1/4″ muscle deep.

(v) Small CLW punctured type over left parietal region.

(vi) Small CLW over right thigh about 1/2″x1/4″

(vii) Small CLW – zigzag over left leg below left knee joint around 1 cm.

(viii) Small CLW over right side of back vertical near midline 1/2″x1/4″x1/4″ muscle deep.

According to his opinion as shown in the certificate, injuries (ii) and (iii) could be caused by hard blunt object, injury (i) could be caused by sharp cutting instrument and injury

(vii) could be caused by hard blunt object like stone and injuries (iv), (v), (vi) and(viii) could be caused by curved pointed weapon.

14.1. In cross-examination, he has admitted that except injury No.(iii), all other injuries were simple. He has not stated anything as to whether injury No(iii) was sufficient in the ordinary course of nature to cause death of the injured person.

15. The prosecution has thereafter examined and relied upon the evidence of P.W.13, Dr. Narendrakumar Gunvantrai Joshi, Ex.60, page 111. He has testified that that on 11.3.1990 he was serving as medical officer at PHC Amod. At 2 PM injured Shivabhai and other injured persons were brought to him with police yadi for treatment. On examination of injured Shivabhai, he noticed the following injuries on his person:

(i) Incised wound on occipital region bleeding size 1 cm x 1 cm scalp deep. Wound semi-lunar in

shape running downwards.

(ii) Incised wound on right mastoids region horizontal in direction 2 cm x 0.2 cm x scalp deep.

(iii) Incised wound on right ear horizontal in direction 3 cm x 0,.5 cm x through and through thickness of right ear.

(iv) Incised wound on right jygometic region horizontal in direction 2 cm x 0.2 cm x scalp deep.

(v) Incised wound on upper part of left shoulder in anterior direction 2 cm x 0.3 cm x muscle deep.

(vi) Incised wound on middle part of back right side in direction 2 cm x 0.2 cm x muscle deep.

15.1. In cross-examination, he has admitted that injury Nos. (ii) to (vi) were simple in nature. He has also not stated anything whether injury No.(i) which was not simple was sufficient in ordinary course of nature to cause of death of

the injured.

16. In view of the aforesaid evidence of both the doctors, it has to be held that all the injuries sustained by Shivabhai were trivial in nature except one injury which was on the neck in the size of 10 cm x 1 cm x scalp deep. Therefore, it is clear that though this injury was somewhat grievous in nature, it was not sufficient in the ordinary course of nature to cause death of injured.

17. It is settled principle of law that to constitute an offence under Section 307 of IPC, two ingredients of the offence must be present, (a) an intention of or knowledge relating to commission of murder; and (b) the doing of an act towards it. For the purpose of Section 307 of IPC what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. This section clearly contemplates an

act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention or knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of section 307 of IPC, there can be no offence of 'attempt to murder'. Intent which is a state of mind cannot be proved by precise direct evidence, as a fact it can only be detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used, the place where injuries were inflicted, the nature of the injuries and the circumstances in which the incident took place.

18. Applying the aforesaid principles to the facts of the present case, on perusal of the entire testimonial collections of the witnesses examined by the prosecution and also the injury certificates issued by two doctors, there was no

intention on the part of the accused to commit the offence of an attempt to commit murder of injured Shivabhai. No mens rea is attributed to the accused to commit the offence of an attempt to commit murder. If the accused was minded to commit the offence of an attempt to commit murder then A-1 would have inflicted injury on the vital part of the body of the injured and he would have inflicted more injuries. But in the instant case, all the injuries sustained by Shivabhai are simple in nature except one injury which was caused with an axe. Similarly injury caused by A-13 is also very trivial in nature. Of course, she used sickle. Both A-1 and A-13 used sharp cutting instrument but that fact itself is not decisive of the factor to come to the conclusion that the accused had intended to commit the murder of the injured. Therefore, according to this court, conviction recorded under Section 307 of IPC cannot be sustained.

19. Having held that the prosecution could not

establish the offence punishable under section 307 of IPC against A-1 and A-13, now we have to decide as to what offence was committed by the accused.

20. To answer the above question, we have to decide whether the injury sustained by Shivabhai was 'hurt' or 'grievous hurt'. In this connection, we have to consider the definition of 'hurt' and 'grievous hurt' provided in IPC. 'Hurt' is defined in section 319 of IPC which says that whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. 'Grievous hurt' is defined in section 320 of IPC. It says that the following kinds of hurt only are designated as “grievous”:-

First – Emasculation.

Secondly – Permanent privation of the sight of either eye.

Thirdly – Permanent privation of the hearing of either ear.

Fourthly – Privation of any member or joint.

Fifthly – Destruction or permanent impairing of the powers of any member or joint.

Sixthly – Permanent disfiguration of the head or face.

Seventhly – Fracture or dislocation of a bone or tooth.

Eighthly – Any hurt which endangers life or which causes the suffered to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

It is consistent evidence of both the doctors that none of the injuries received by the injured Shivabhai except injury No.(iii) inflicted by A-1, which is a CLW over right ear, fall within any of the definitions of 'grievous hurt' as defined under Section 320 of IPC. Therefore, the injuries inflicted upon Shivabhai by both the accused are 'hurt' within the meaning of Section 319 of IPC. Therefore, both the accused have committed offence punishable under Section 324 of IPC.

21. Section 333 of IPC is a penal provision

for voluntarily causing 'grievous hurt' to deter public servant from his duty. In view of the finding recorded by this Court that the injuries caused to Shivabhai were not grievous, the conviction under section 333 of IPC is also required to be altered to conviction under Section 332 of IPC which is penal provision for voluntarily causing 'hurt' to deter public servant from his duty.

22. In this connection, at the cost of repetition, be it stated that none of the injuries caused to victim Shivabhai except the injury No.(iii) inflicted by A-1 on Shivabhai which is a CLW over the right ear, fall within any of the definition of 'grievous hurt' as provided in Section 320 of IPC. Therefore, it has to be held that all the injuries sustained by the victim Shivabhai are simple in nature. Therefore, it is clear that the prosecution has not been able to establish that the accused have committed offence punishable under Section 333 of IPC but

it could be said that they have committed offence punishable under Section 332 of IPC.

23. In view of the aforesaid finding, the conviction recorded under Section 307 of IPC has to be altered to an offence committed by the accused punishable under Section 324 of IPC. Similarly conviction recorded under Section 333 of IPC is also required to be altered to an offence committed by the accused punishable under Section 332 of IPC.

24. So far as conviction recorded for the offence punishable under Section 353 of IPC and Section 135 of BP Act is concerned, it is required to be noted that Section 353 of IPC is a penal section for assault or criminal force to deter public servant from discharge of his duty. So far as Section 135 of the BP Act is concerned, it is a penal provision for any contravention of rule or directions issued under Sections 37, 39 or 40 of BP Act. Section 37 of BP Act is with regard to

power to prohibit certain acts for prevention of disorder for the preservation of public peace or public safety by a notification publically promulgated or addressed by the Commissioner and the District Magistrate in areas under their specific charges to individuals, prohibit at any town, village or place or in the vicinity of any such town, village or place, the carrying of arms, cudgels, swords, spears, bludgeons, guns, knives, sticks or lathis or any other article, which is capable of being used for causing physical violence and Section 39 of BP Act is regarding issue of orders for prevention of riot, etc., wheres Section 40 of BP Act is with regard to issue of orders for maintenance of order at religious ceremonials, etc. A -1 and A-13 were armed with sharp cutting instruments while attacking the injured Shivabhai. Therefore conviction and sentence under Sections 353 of IPC and 135 of BP Act has to be maintained and confirmed.

25. In view of the foregoing discussion, according to this Court the incident as alleged took place on 11.3.1990 on Holi-Dhuleti festival day. The accused were quarrelling with village people. Therefore, the police party reached at the spot and intervened. Shivabhai and others stopped the quarrel and caught hold of A-1. Some villagers started scuffling with police personnel and taking advantage of the scuffle A-1 got released and ran away and came back with an axe and inflicted blow on injured Shivabhai. A-13 also came with a sickle and assaulted Shivabhai. All the injuries except one injury sustained by Shivabhai were trivial and there is no evidence on record to show that any of the injuries sustained by injured Shivabhai was sufficient in the ordinary course of nature to cause his death. Injury No.(iii) was not a 'grievous hurt' as provided in Section 320 of IPC but it only a 'hurt' as described in Section 319 of IPC. There was no mens rea on the part of the accused to commit the offence of an attempt to commit murder of Shivabhai or other injured witnesses

and, therefore, offence under Section 307 of IPC is not made out. On the contrary, as discussed earlier, it has to be held that A-1 and A-13 have committed the offence punishable under Section 324 of IPC. The injuries sustained by injured Shivabhai were not 'grievous hurt' as provided under section 320 of IPC but they were only 'hurt' as provided in section 319 of IPC and, therefore, conviction under Section 333 of IPC is not made out and as discussed earlier, it has to be held that the accused have committed offence punishable under Section 332 of IPC.

26. As stated above, conviction and sentence of A-1 and A-13 for commission of offences punishable under Sections 353 of IPC and 135 of BP Act is held to be in accordance with law and is required to be confirmed and maintained. However, as discussed above, conviction of A-1 and A-13 for commission of offence under section 307 of IPC and conviction for commission of offence under section 333 of IPC are required to

be altered into conviction under Sections 324 and 332 of IPC respectively. Therefore, it has to be held that A-1 and A-13 have committed the offences publishable under Sections 324, 332 and 353 of IPC and Sectoion 135 of BP Act.

27. Having held that A-1 and A-13 have committed offence punishable under Sections 324 and 332 of IPC instead of Sections 307 and 333 of IPC, let us consider what punishment should be imposed on them.

28. So far as sentence for commission of offence under section 324 of IPC is concerned, it is punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both. Similarly the sentence for commission of offence under section 332 of IPC is punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

29. So far as the sentence undergone by both the accused is concerned, as per the jail record produced by Mr. K.T. Dave, learned APP regarding the period of imprisonment undergone by the accused, it is seen that A-1 is in jail and has undergone imprisonment for more than five years whereas A-13 is on bail. However, she had undergone imprisonment for more than one year and ten months. Therefore, according to this Court, the custodial sentence undergone by accused deserves to be considered as substantive sentence for the offences proved against them, which would meet the ends of justice.

30. In the above premises, the impugned judgment and order convicting A-1 and A-13 for commission of the offences punishable under Sections 307 and 333 of IPC deserves to be quashed and set aside by altering the conviction for commission of offences under Section 307 of IPC to section 324 of IPC and under Section 333 of IPC to Section 332 of IPC whereas conviction for commission of

offence punishable under Section 353 of IPC and Section 135 of the BP Act deserves to be confirmed and maintained. So far as the sentence against the accused is concerned, the custodial sentence so far undergone by them deserves to be treated as substantive sentenced for commission of all the offences proved against them.

31. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. Consequently, the order of conviction for commission of the offence under sections 307 and 333 of IPC is quashed and set aside by altering the conviction for commission of offences under Section 307 of IPC to Section 324 of IPC and under Section 333 of IPC to Section 332 of IPC whereas conviction under section 353 of IPC and Section 135 of the BP Act is confirmed and maintained. In short, the accused are convicted for commission of the offences

punishable under Sections 324, 332 and 353 of IPC and under Section 135 of the BP Act. So far as the sentence is concerned, the custodial sentence undergone by both the accused shall be treated as substantive sentence for the offences proved against them.

32. A-1 is in jail. Therefore, the jail authorities are directed to set him at liberty forthwith if he is not required in connection with any other case.

33. A-13 is on bail. Therefore her bail bonds shall stand cancelled and sureties are discharged.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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